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Attention Mr Asgar A. Bawa
Select Committee on Land and Mineral Resources
By email: abawa@parliament.gov.za

Submission on the Plant Breeders' Rights (PBR) Bill [B 11B – 2015]

Thank you for the opportunity to provide further comment on the Plant Breeders' Right Bill.

Our submission follows below and consists of:

- Background on Biowatch South Africa
- General comments
- Comments on the specific provisions of the Plant Breeders' Rights (PBR) Bill [B 11B – 2015]

Yours sincerely

Rose Williams
Director

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Board Members: Dr David Fig (chairperson), Prof. Loretta Feris, Ms Thoko Makhanya, Dr Nombulelo Siqwana-Ndulo, Ms Beni Williams, Ms Rose Williams, Prof. Rachel Wynberg

Biowatch South Africa

Biowatch is a non-governmental organisation established in 1999, which strives for social and ecological justice within the context of food sovereignty. Biowatch works to challenge unsustainable agricultural practices and to advocate for agroecology as an ecologically viable alternative that safeguards people and land. This includes supporting smallholder farmers; working with civil society to create joint understanding and action; and constructively engaging with government in implementing policies and practices that promote, facilitate and actively support agroecology and farmers' rights. We have a long track record of working on issues concerning seeds and indigenous knowledge systems, not only with farmers but also internationally. Our contribution to this draft Bill thus stems from this experience.

General comments on the PBR Bill

It is with some dismay that we have reviewed the changes to the PBR Bill. In our previous submission (dated 14th June 2013) we outlined the context to consider when drafting law on Plant Breeders' Rights.

Following from this we highlight the need to:

- Balance the rights conferred to private companies against the development needs of South Africa.

- Recognise the diversity of farmers, seed and cropping systems in South Africa. Although many farmers rely on the formal seed system for accessing seed, they also rely on saving their own seed. The extent to which Farmer Managed Seed Systems, are still playing a critical role in agriculture, especially for the 2.5 million smallholder farming families, is mostly under-researched. The research that is available indicates that on farm seed breeding and saving is widespread - smallholders rely on farm-saved seed for 60-70% of their seed needs[1], complex, and vital for food security in the country.

- Promote and conserve agricultural diversity, which is threatened by the trends in plant breeding where the germplasm is increasingly privatised and owned by a handful of multinational companies. (This situation will worsen should the mergers in this sector go ahead.) Our PBR law should defend the right of farmers, researchers and public sector plant breeders to access genetic resources for research and the breeding of varieties in the public interest and find ways to support Farmer Managed Seed Systems.

- South Africa is a party to UPOV 1991 by virtue of signing UPOV 1978. It is not obliged to sign or implement UPOV 1991. Despite the policy flexibility this allows to protect both farmer and breeders' rights, the opportunity is ignored by the current draft of this Bill. Not only that, the Bill goes even beyond what is required in in UPOV 1991. And you have to ask why this is the case? Why does this Bill benefit companies at the cost of farmers to the extent

[1] Louwaars, N.P., & de Boef, W.S. 2012 Integrated seed sector development in Africa: A conceptual framework for creating coherence between practices, programs, and policies. *Journal of Crop Improvement*, 26:1, 39-59 http://www.issdseed.org/sites/default/files/resource/louwaars_and_de_boef_issd_1_paper.pdf [31 August 2016].

that it does? The accompanying memorandum on the objects of the Bill cites the need to comply with the TRIPS Agreement and "other developments" in the plant breeding industry. This is erroneous as TRIPS only requires that plant breeders' rights are included – either through patents or *sui generis* systems. There are many examples of national laws where the rights of farmers to develop and save seed and conservation needs are balanced against the demands from the commercial sector.

Extinguishing farmers' rights to save and re-use seed is historic and is unprecedented in 10,000 years of agriculture. This PBR Act will repudiate the efforts of farmers over generations. This was a collective effort that has created the genetic basis on which all plant breeding currently relies; whether protected, registered or not. The current Bill transfers the cost of seed development to farmers and enrich companies at the expense of farmers. We recognise that breeding efforts should be rewarded, but to extend this reward ad infinitum and at the same time transfer the rights to save and exchange seeds from farmers to multinational companies, is unjust and short sighted.

Rather than recognising and accommodating the needs of farmers and championing the development needs of the country, the current draft of the Bill has further reinforced the rights of commercial plant breeders, which due to the privatisation of public breeding programmes and consolidation in the agricultural sector are de facto multinational companies. It is inexcusable that the flexibilities allowed in UPOV 1978 have not been utilised in drafting this legislation to defend South Africa's seed diversity and farmers from being undermined by these corporations in their relentless pursuit of profit. Instead, the Bill has relegated the protection of smallholder farmers and the agricultural diversity they manage to yet to be drafted regulations, and criminalises farmers for age-old practices of seed breeding, saving and exchange that have contributed to the crop development and diversity that has fed communities through the centuries.

The current Bill is written in the narrow context of commercial plant breeding, which ignores the existence of farmer managed seed systems and the inherent differences in this compared to commercial breeding:

- Uniformity is central to the formal and corporate seed system. To qualify for plant breeders' rights new varieties of plants must be distinct, uniform and stable. This is at odds with locally adapted farmer varieties, which are variable in appearance and traits due to their diverse genetic make-up. This inherent diversity is their strength (enabling the plants to quickly adapt to changing conditions such as climate variability, difficult growing conditions and pests) and is the foundation for long-term food security, especially in the context of increasing climate variability.

- The traits of interest to the commercial sector are limited and different when compared to farmer seed systems, which seek to satisfy a range of social, cultural, economic and production needs.

- Farmer seed has the advantage of being affordable and generally more available to resource-poor smallholders. Often the formal seed sector and even government support programmes are unable to deliver an appropriate quality and quantity of seed to

smallholders when they need it, and at an affordable price.[2] The formal sector is interested in varieties that do well in commercial ventures, and that perform well in a highly mechanised, high input environment and a global distribution system which is mostly unaffordable and unattainable to smallholders.

- It is also important to remember that farmer seed systems are viable only if they include the introduction of new germplasm through seed exchanges and ingression from wild relatives[3].

Given their importance for food security and the long-term viability of agriculture, we strongly urge that the Bill acknowledge farmer-manged seed systems and that:

- A clause is included in Section 10 to provide an *a priori* right for farmers to save, plant and exchange farm saved seed, so that these are guaranteed as an inalienable (and human) right in the legislation and are not left to transitory regulations.

- New sections are drafted that broaden the scope and understanding of plant breeding to enable support for farmer managed seed systems and especially public sector and research support for the development of varieties and crops suited to the climatic, economic and cultural needs of the majority of farmers in South Africa. At the very least any current provisions in the Bill that stifle or prevent this development should be removed.

- The historical right of farmers to keep their farming system viable and sustainable with practices that include saving, exchanging and selling seed to each other, is recognised and protected.

Comments on the specific provisions of the Plant Breeders' Rights (PBR) Bill [B 11B – 2015]

Definitions. Section 1

The definition of "breeder" is very narrowly defined as a person or employer, which excludes the notion that communities of people may jointly develop varieties or that partnerships may exist between scientists and communities to develop new varieties. In effect then, this definition will mean that new varieties developed through participatory breeding between farmers and scientists will be registered with the research institution, nullifying the role of farmers in the process.

Chapter 2: Plant Breeders' Right

Protection given to the holder of PBR

7. (1)

We strongly object to PBR that limits the right to produce, condition, and stock seeds, to breeders only. These are activities all farmers undertake in the process of farming. This definition therefore limits the rights of farmers to save, plant and exchange seed.

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[2] Louwaars. Op.cit.

[3] FAO. op.cit.

7. (2)

We strongly object to PBRs being extended to harvested material and the products of harvested materials as this effectively gives corporations ownership of the resulting food value chain through ownership of the germplasm. It can also mean that the breeder or company can claim royalties on the farmer's harvest at any time during the entire length of the royalty period, which this Act proposes to be 30 years.

7. (3)

Therefore, the exemption clauses must leave no room for interpretation or ambiguities and must make its principles clear.

By leaving this right to be detailed in future regulations at the discretion of the Minister, farmers will be required to:

- Keep updated on complex sets of inclusions and exclusions for different crops that will place an unrealistic burden on smallholders; and
- engage with subsequent rounds of drafting of regulations, which is beyond the reach of most farmers.

Furthermore, regulations can be amended from time to time in a manner which steadily erodes farmers' rights.

We therefore urge that the right of all farmers to save, plant and exchange any variety of seed is embedded in the Act.

This act must decriminalise and allow for saving of seed by any farmer, and smallholder farmers must also be allowed to continue the practice of selling farm-saved seed in their communities, to other smallholders and at farmers' markets. In this regard, the clauses 23. (6) (a – f) in the existing Plant Breeders' Rights Act of 1976 as amended, are preferable and should be re-included in this Bill.

The previous version of the Bill had a clause on the Innocent Infringement of the Bill (Section 52). This has been removed. We urge for this Section to be included again, as many farmers do save seed without being aware that they are meant to pay royalties and that there are restrictions on the further use of the seed or harvested material.

10.(2)(b)

This clause needs to define what the 'legitimate interests' of a breeder may include, and how these interests are balanced against the right to food and the interest of the country in ensuring that we maintain adequate agri-diversity both in the varieties and types of crops grown to have a sovereign and adaptable agriculture.

Additional clause

Companies are already requiring farmers to sign contracts that prohibit the saving of seed from open pollinated varieties. To ensure that the right of smallholder farmers to save and plant varieties, an additional clause should be included that protects farmers from possible contracts with seed companies that attempt to undermine exceptions to PBR. This could say: "Any agreement which restricts or annuls the exceptions to the right to protection for varieties referred to in Article 10. (2) shall be deemed to be null and void."

Appointment of members of the advisory committee and termination of membership 46(1)(b)

One of the 2 representatives for farmers should specifically represent the smallholder farming sector.

Offences and penalties
55.1 (a) and (b)

We object to the criminalising of farmers who exercise their age-old right to save, replant and share seed in favour of a private right over the public commons. The penalty of a fine and/or 10 years' imprisonment in the case of farmers is extreme. In most cases farmers will not even be aware that they have committed a crime as seed saving is widespread practice and the source of seed in the informal system is largely unclear. Even in the case of plant breeders, this criminalisation in relation to essentially derived varieties as outlined in clause 7. (3)(a) is likely to deter the development of new varieties.

These clauses do not differentiate between large-scale breeders and seed saving farmers, and even seems to assume that individuals will be guilty. For example, it is unclear who would be imprisoned in the case where a multinational company was found guilty of an offence.

Furthermore, given that PBRs are defined as private rights even in the WTO TRIPS Agreement, the rights holder should monitor and enforce their right, which is already provided for in Clause 33. (1) To further criminalise infringements is draconian and an unnecessary drain on government resources, especially given the broad scope of PBR under this Bill and the extent of possible infringements arising from this.